IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1198 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES : YES

2. To be referred to the Reporter or not? YES, but not para 4 of the judgment. :

3. Whether Their Lordships wish to see the fair copy of the judgement? NO. : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO. : NO

5. Whether it is to be circulated to the Civil Judge? NO

STATE OF GUJARAT

Versus

MANIBEN W/O.GANDU JADAV

Appearance:

MR.K.C. SHAH, learned A.P.P. for Petitioner

MR KR RAVAL for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 03/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. In this appeal which is filed under Section 378 of the Code of Criminal Procedure, 1973. The State of Gujarat, claims that respondent should not have been convicted of lesser offence punishable under Part-II of Section 304 of the Indian Penal Code, but should have been convicted under Section 302 of the Indian Penal Code for committing murder of her daughter-in-law.

2. Deceased Santokben was married to Parshottambhai Patel of village Jamvadi, Taluka Gondal, District Rajkot. During the subsistence of the marriage she had given birth to three children who were all girls. The respondent who is the mother-in-law of Santokben was dissatisfied with Santokben because she was not able to bear a boy. According to the prosecution the incident took place in the morning of November 29, 1984. On that day at about 7.00 a.m. in the morning the deceased with her youngest daughter Minaxi had gone to fetch water. After fetching water she was coming back with water pot on her head and was also carrying Minaxi. According to the prosecution, at that time the respondent came with a burning wick made of rags and set on fire the terylene clothes put on by the deceased from all sides. The deceased brought down her minor daughter whom she was carrying and managed to reach her house trailing though she had received extensive burn injuries. After reaching her house the deceased summoned her daughter Nita who had gone to attend her school. Nita in turn informed witness Babulal Liladhar and the deceased was removed to Gondal Government dispensary at about 9.35 a.m. At Gondal Government hospital the deceased was examined by Dr.Hareshkumar N. Savaliya, who was Medical Officer at the said dispensary and on finding that the deceased had sustained more than 50% burns, he advised the persons accompanying her to remove her to Rajkot Hospital. Meanwhile at about 11.20 a.m. witness D.P. Trivedi, who was then on duty as the Deputy Mamlatdar and Executive Magistrate was sent a report by Gondal Taluka Police Station informing him that the deceased was admitted to hospital with burn injuries and he should record her dying declaration. Accordingly, Mr.Trivedi, Executive Magistrate had gone to Gondal hospital and after verifying from Dr.Savaliya that deceased was conscious and in a fit state of mind to make statement, had recorded her dying declaration, which is produced on record of the case at Exh.15. At about 11.00 a.m. on that day an information was conveyed by Mr.Ghanshyambhai

who was police constable on duty at Gondal hospital, to Umiyashanker Jivram who was P.S.O. at Gondal Taluka Police Station about the deceased having been admitted in the hospital for treatment of her burn injuries. Mr.Umiyashanker who was P.S.O. of Gondal Taluka Police Station had in turn asked Jamadar Sultan Siddi at about 11.00 a.m. to go to the dispensary and record the complaint. Accordingly, Jamadar Sultan Siddi had gone to the Gondal hospital and recorded the complaint of the deceased at about 12.45 noon which is produced on the record of the case at Exh.46. Thereafter, the deceased was removed to Rajkot Government Hospital. During the course of treatment the deceased died on December 7, 1984. At the instance of Head Constable C.D. Vyas, autopsy on the dead body of the deceased was performed by Dr.Tarlikaben H. Shah. Necessary investigation into the case was made by P.S.I. Mr.L.S. Chavda of Gondal Taluka Police Station. Mr.Chavda was assisted by Mr.Vijay J. Menad, who was then appointed as probationer P.S.I. At the conclusion of the investigation, the respondent was chargesheeted for the offence punishable under Section 302 of the Indian Penal Code. As the offence punishable under Section 302 of the Indian Penal Code is exclusively triable by Court of Sessions, the case was committed to the Court of learned Additional Sessions Judge, Gondal, District Rajkot, for trial where it was numbered as Sessions case No.15/85. Charge against the respondent for the offence punishable under Section 302 of the Indian Penal Code was framed which was read over and explained to the respondent who pleaded not guilty to the same and claimed to be tried. The prosecution therefore, examined; (1) Bavanji Kurji as P.W.2 Exh.7, (2) Hemkunver Jeraj as P.W.3 at Exh.8, (3) Ila Parshottam as P.W.4 at Exh.9, (4) Babulal Liladhar as P.W.5 at Exh.10, (5) Chandrika Nagji as P.W.6 at Exh.11, (6) Dr.Tarlikaben H. Shah as P.W.7 at Exh.12, (7) Dinesh P. Trivedi as P.W.8 at Exh.14, (8) Keshavlal Bhavanbhai as P.W.9 at Exh.16, (9) Bavabhai Polabhai as P.w.10 at Exh.17, (10) Parshottam Gandubhai as P.W.11 at Exh.18, (11) Nita Parshottam as P.w.12 at Exh.19, (12) Mina Parshottambhai as P.W.13 at Exh.20, (13) Sultan Siddibhai as P.W. 14 at Exh.21, (14) Umiyashanker Jivraj as P.W.15 at Exh.28, (15) Kaviben Ghusha as P.W.16 at Exh.32, (16) Punaben Savabhai as P.W.17 at Exh.33, (17) Chhaganbhai Meerambhai as P.W.18 at Exh.34, (18) Dinesh Jayantilal as P.W.19 at Exh.36, (19) Dr.Haresh N. Savaliya as P.W.20 at Exh.39 and (20) Vijay Jivaji Menad as P.W.21 at Exh.40, and also produced documentary evidence such as postmortem notes of the deceased, dying declaration of the deceased recorded by Mr.Trivedi, complaint lodged by the deceased, different panchnamas etc., to prove its case against the

respondent. After recording of evidence of prosecution witnesses was over, the learned Judge recorded the statement of the respondent under Section 313 of the Code. In her further statement, the respondent denied the case of the prosecution, but did not examine any witness in support of her case.

3. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that the deceased died a homicidal death. The learned Judge referred to the complaint lodged by the deceased as well as her dying declaration recorded by Executive Magistrate Mr.Trivedi and concluded that the contents of the First Information Report as well as dying declaration were reliable and trustworthy. The learned Judge further referred to the evidence of Dr.Tarlikaben and held that the deceased had died on December 7, 1984, because of decay which had set in the body. The learned Judge made a reference to decision of Supreme Court in Jairaj v. State of Tamil Nadu A.I.R., 1976 S.C.1519 and held that though it was proved that the respondent had set the deceased on fire, the medical evidence established that the injuries sustained by the deceased were not sufficient in the ordinary course of nature to cause her death and therefore the respondent had committed offence punishable under Section 304 Part-II of the Indian Penal Code. The learned Judge thereafter heard the respondent regarding sentence to be imposed and after hearing the respondent, the learned Judge has convicted the respondent under Section 304 Part-II of the Indian Penal Code and sentenced her to R.I. for five years and fine of Rs.3,000 in default. R.I. for one year, vide judgment dated June 15, 1985, giving rise to the present appeal.

4. We may state that after admission of the appeal and service of notice on the respondent, the respondent had not engaged any lawyer to plead her case and therefore, Mr.B.N. Raval, learned advocate was appointed as amicus curiae to plead the case on behalf of the respondent. Mr.Raval had also taken a copy of the paper book of November 20, 1992, but though the appeal was notified on the final hearing board on 16 occasions, Mr.Raval did not appear before the Court on behalf of the respondent. Again the appeal was notified on final hearing board prepared on March 12, 2000 at Sr. No.16 and when it was called out Mr.Raval who was appointed as amicus curiae could not remain present. Therefore the Court Sheristedar was directed to give intimation to Shri Raval through his clerk. On receipt of information that the matter was likely to be called out for final hearing,

the clerk had personally come to the Court room and noted down the particulars of the appeal such as number of appeal, name of the parties, etc., but Mr.Raval did not remain present before the Court on March 22, 2000. Under the circumstances, the Court concluded that Mr.Raval was not interested in conducting the matter on behalf of the respondent and vide order dated March 22, 2000, Mr.K.R. Raval, learned advocate practising mainly on criminal side in this Court, was appointed amicus curiae in the matter and requested to appear on behalf of the respondent. Mr.K.R. Raval, learned counsel had obtained copy of the paper book and has made vehement submissions before the Court on behalf of the respondent, after going through the whole record of the case.

5. Mr.K.C. Shah, learned A.P.P., submitted that deceased who had water pot over her head and who was carrying a little girl in her waist was set on fire by the respondent by means of a burning wick made of rags and as her intention was to cause the death of the deceased she should be convicted under Section 302 of Indian Penal Code. After referring to clause four of Section 300 of Indian Penal Code, the learned counsel also pleaded that the respondent very well knew that her act of setting fire to the terylene clothes put on by the deceased was so imminently dangerous that it would in probability, cause death of the deceased or such bodily injury as was likely to cause death of the deceased and as this act was done without any excuse for incurring the risk of causing death or injury, the respondent could not have been convicted of lesser offence punishable under Section 304 Part-II of Indian Penal Code but should have been convicted under Section 302 of Indian Penal Code. Stress was laid on the circumstance that the respondent after preparation had set on fire terylene clothes of the deceased, who was not able to offer any resistance and as the respondent had taken risk of causing death or such bodily injury as was likely to cause death, the acquittal of the respondent of the offence punishable under Section 302 of the Indian Penal Code should be reversed. In support of his submissions the learned counsel placed reliance on the decision of the Supreme Court in State of Madhya Pradesh v. Ram Prasad A.I.R.. 1968, S.C. 881.

6. Mr.K.R. Raval, learned advocate for the respondent urged that on arrival of the Executive Magistrate Shri Trivedi, Dr.Savaliya had certified that the patient was conscious but had not certified that the patient was in a fit state of mind and as the Executive Magistrate had himself satisfied the fit state of mind of the deceased without medical certificate, the dying

declaration recorded by the Executive Magistrate should not be relied upon. Further it was stressed that police constable Mr.Sultan Siddibhai had recorded the First Information Report as stated by the deceased without obtaining certificate of any kind from Dr.Savaliya and therefore First information Report recorded by the said witness after satisfying himself that the deceased was in a fit state of mind should be treated as unreliable piece of evidence. What was maintained was that there was no mention of dying declaration recorded by Mr.Trivedi in the F.I.R. which was reduced into writing by witness Siddibhai and therefore the conviction based on dying declaration should be set-aside. In the alternative, it was claimed that the prosecution has failed to prove that the respondent had set the deceased on fire with the intention of causing her death and therefore the appeal being substanceless should be dismissed. The learned counsel for the respondent extensively referred to the medical evidence on record and pleaded that as the injuries sustained by the deceased were not sufficient in the ordinary course of nature to cause her death but were likely to cause her death, no case under Section 300 of Indian Penal code was made out against the respondent at all. Further it was argued that death of the deceased was consequent to septicaemia, and as the death had taken place after several days of the incident, the respondent was rightly convicted under Section 304 Part-II of Indian Penal Code and should not be convicted under Section 300 of Indian Penal Code. The learned counsel emphasized that the view taken by the learned Judge of Trial Court is in accordance with law and the same should not be interfered with by this Court in the present acquittal appeal. In support of his submissions the learned counsel placed reliance on the decisions in cases ; (1) B.N.Kavatakar and another v. State of Karnataka, 1994 S.C.C (Criminal) 579, (2) Kaluram v. State of Rajasthan, 2000, S.C.C. (Criminal), 86 and (3) Manik Malakar v. State of Assam, 1976 Cri.L.J. 1921.

7. We have heard the learned counsel for the parties and taken into consideration the evidence on record. We may state that the respondent has not challenged her conviction under Section 304 Part-II of the Indian Evidence Act, by way of filing an appeal. However, in an acquittal appeal, the respondent is entitled to plead that she is innocent and should not have been convicted at all. Therefore, in order to assure ourselves that the conviction based on dying declaration is proper, we have considered minutely and in detail, the evidence relating to dying declaration.

8. Before appreciating the evidence of the witnesses and the contents of dying declarations, it would be relevant to notice the law relating to dying declaration. Section 32 (1) of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by cross-examination, it is not credit worthy. Under Section 32 (1) when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that category provided it has been made while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinise all the dying declarations to find out if each one of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such

a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true ; (1) Was the victim in a position to identify the assailant/s ? , (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ? & (3) Whether any material part is proved to be false by other reliable evidence ?

9. In the light of the above referred to principles we will now proceed to consider the evidence on record relating to dying declarations. The prosecution examined; (1) Hemkunverben Jerajbapa as P.W.3 at Exh.8, (2) Ilaben Parshottambhai as P.W.4 at Exh.9, (3) Babulal Liladhar as P.W.5 at Exh.10, (4) Chandrika Nagjibhai as P.W.6 at Exh.11, (5) Keshavlal Bhavanbhai as P.W.9 at Exh.16, (6) Bavabhai Polabhai as P.W.10 at Exh.17, (7) Parshottambhai Gandabhai as P.W.11 at Exh.18, (8) Nita Parshottambhai as P.W.12 at Exh.19, (9) Mina Parshottambhai as P.W.13 at Exh.20, (10) Kaviben Ghusabhai as P.W.16 at Exh.32 and (11) Punaben Savabhai as P.W.17 at Exh.33 to prove its case that the deceased had made oral dying declaration before the witnesses, that she was set on fire by the respondent. However, a bear reading of their evidence shows that they have not supported the prosecution and were treated hostile to the prosecution. All the abovenamed witnesses were contradicted with their previous statements recorded during the course of investigation and therefore the claim made by these witnesses in their examination-in-chief to the effect that the deceased had not informed them that the respondent had set terylene clothes put on by her on fire is unreliable and cannot be accepted. The best that can be said is that the evidence of these witnesses does not prove the case of the prosecution against the respondent but the evidence of

these witnesses would not, in any manner detract from the evidentiary value of the dying declarations, if they are otherwise found to be true and reliable.

10. The evidence of witness Bavanji Kurji P.W.2 recorded at Exh.7 indicates that he is the brother of the deceased and on learning that the deceased was admitted at Rajkot Hospital with burn injuries, he had gone to the hospital and had met her. According to this witness his sister had told him that the respondent had set her on fire because she was not able to bear a son. This witness was cross-examined, on behalf of the defence and it was sought to be proved that he had stated in his police statement that deceased had told him that she was set on fire by the respondent by throwing a burning wick of rags. However, after going through the evidence of the Investigating Officer, we find that the contradiction is not proved as required by law. Therefore, the claim made by this witness in his examination-in-chief to the effect that the deceased had made an oral dying declaration before him and had implicated the present respondent deserves acceptance more particularly in absence of material improvements or contradictions appearing in his evidence. The evidence of Dr.H.N. Savaliya, medical officer who was on duty at Gondal Government Hospital shows that the deceased was admitted to the hospital at 9.35 a.m. on November 29, 1984, and on examination he had found that the deceased had sustained more than 50% burns. According to Dr.Savaliya, the Executive Magistrate had come to the hospital for recording dying declaration of the deceased and after examining the deceased he had informed the Executive Magistrate that deceased was conscious and was fit to make a statement. The witness has asserted before the Court that the Executive Magistrate had recorded the dying declaration of the deceased and below dying declaration he had signed an endorsement made by the Executive Magistrate to the effect that the deceased was conscious all throughout. The witness maintained before the Court that all throughout, the deceased was conscious and in a fit state of mind till she was removed to Rajkot hospital. This witness was also cross-examined at length by the learned counsel for the defence, but nothing could be elicited so as to doubt his version that deceased was conscious as well as in fit state of mind to make statement and that her statement was recorded by the Executive Magistrate. Evidence of Executive Magistrate Mr.Trivedi P.W.4 recorded at Exh.14 establishes that he had recorded dying declaration of the deceased after being satisfied through Dr.Savaliya that the deceased was in a fit state of mind to make a statement. This witness

was also cross-examined, on behalf of the respondent, but nothing could be brought on record to doubt his claim that he had recorded the statement of the deceased as narrated by her. The dying declaration of the deceased which is produced by Mr.Trivedi at Exh.15 indicates that while deceased was returning home after fetching water, the respondent had set her terylene clothes on fire by means of a burning wick of rags. The evidence of witness Sultan Siddibhai P.W.4 recorded at Exh.21 indicates that this witness at the relevant time was on duty as Jamadar at Gondal Taluka Police Station and had received an information at about 11.00 a.m. from Umiyashanker Jivram P.W.15 Exh.28, then P.S.O. of Gondal Taluka Police Station that the deceased was admitted at Gondal Government Hospital with burn injuries and that he should record her complaint. The witness has maintained before the Court that he had gone to Gondal Government Hospital and after making enquiries with the deceased, had recorded the First Information Report as stated by the deceased. The witness has also stated before the Court that after reducing the complaint of the deceased into writing he had obtained thumb impression of the deceased thereon. This witness was cross-examined on behalf of the respondent. Except suggesting to the witness that deceased had not lodged complaint or that the witness had not obtained thumb impression of the deceased on the complaint, nothing was suggested to this witness that deceased was unconscious or that she was not in a fit state of mind to narrate the incident to the witness. The witness produced the complaint lodged by the deceased at Exh.46. The evidence of witness Sultan Siddi further shows that he had recorded the complaint on November 29, 1984 at about 12.45 noon and the same was despatched to the learned Judicial Magistrate, First Class, Gondal as required by Section 157 of the Code which was received by the learned Magistrate on November 30, 1984 at about 11.30 a.m. In Munnu and another v. State of Madhya Pradesh, A.I.R. 1976 S.C. 2199, the Supreme Court has ruled that where after making statement before the police, the victim succumbs to his injuries, the statement can be treated as a dying declaration and is admissible under Section 32 (1) of the Evidence Act. Therefore, the First Information Report recorded by witness Siddibhai as stated by the deceased will have to be treated as her dying declaration and is admissible in evidence under Section 32 (1) of the Evidence Act. The contents of the complaint also indicate that the deceased was in a fit state of mind and after understanding everything had lodged the complaint with Jamadar Sultan Siddi. It is difficult to believe that witness Siddibhai would imagine the facts stated in the complaint produced

at Exh.46 and create false document. It was never suggested on behalf of the defence to this witness that he had any enmity towards respondent. This witness had no grudge against the respondent nor any enmity and therefore would not concote a false evidence against the respondent. The complaint at Exh.46 also proves that the deceased while in fit state of mind had stated in her complaint that when she was returning home after fetching water, her clothes were set ablaze by the respondent by means of a burning wick of rags. The most incriminating evidence against the respondent is in the form of testimony of Dr.Tarlikaben H. Shah who had performed autopsy on the dead body of the deceased. This Doctor has maintained before the Court that the deceased was admitted as an outdoor patient at Rajkot Civil Hospital on November 29, 1984 at 2.25 p.m. and at that time her blood pressure was normal. After perusing the medical papers, the Doctor very firmly stated before the Court that the deceased was all throughout conscious right from the date she was admitted to hospital till she expired on December 7, 1984. She has maintained before the Court that when she saw the victim first time in the hospital, the victim was conscious and she had also occasion to talk with her. This part of the evidence of Dr.Tarlikaben is not shaken in any way during her cross-examination. The medical evidence on record does not even remotely indicate that the mental faculties of the deceased were impaired in any manner at all. Therefore, the claim made by the Executive Magistrate, and the police Jamadar that they had recorded the statements of the deceased as narrated by her, becomes more reliable. In the light of evidence of Dr.Tarlikaben read with the evidence of Dr.Savaliya, all criticisms levelled against the dying declarations pale into insignificance. In Paparambaka Rosamma and Ors. (supra) the victim had made a statement that three accused had poured kerosene on her but it was found that she herself had also poured kerosene on her. Moreover, it was noticed that earlier she had attempted to commit suicide and had not taken food for days. Further, nothing could be shown as to why all the three accused should pour oil and all should burn with lighted matchsticks. It was noticed that accused No.3 had tried to extinguish the fire by putting water. Under the circumstances, the Supreme Court has held that, dying declaration recorded by the Magistrate after satisfying himself about the fit state of mind without medical certification cannot be relied upon. In our view, the principle laid down by the Supreme Court in the abovequoted decision would not be applicable to the facts of the present case in view of firm testimony of (1) Dr.Savaliya, (2) Dr.Tarlikaben Shah

(3) Executive Magistrate Mr.Trivedi and (4) Police Jamadar Mr.Siddibhai indicating that the deceased was in a fit state of mind to make the statements. While stating the law regarding dying declaration, we have observed that one of the important tests of reliability of dying declaration is that the person recording it should be satisfied that the deceased was conscious and was in fit state of mind to make statement. The evidence of Executive Magistrate Shri Trivedi and police Jamadar Siddibhai would indicate that they were satisfied that the deceased was in a fit state of mind to make statement and therefore they had recorded her dying declaration and complaint respectively as narrated by her.

11. The submission based on the decision of the Gauhati High Court in Manik Malakar (supra) that omission of dying declaration recorded by Executive Magistrate Mr.Trivedi in F.I.R. lodged with witness Siddibhai is fatal to the prosecution case is devoid of merits. It is true that Gauhati High Court, after referring to decision of the Supreme Court in Ram Kumar v. State of Madhya Pradesh, A.I.R. 1975, S.C. 1026 has held that non-mention of dying declaration in F.I.R. is fatal to prosecution case. However on reference to Ram Kumar's case, we find that the Supreme Court has not considered effect of omission of dying declaration in F.I.R. at all. What is considered by the Supreme Court in the said case is effect of omission to state important facts relating to the incident. Dying declaration can never be treated as an important fact of the incident itself. It is always recorded after the incident is over and does not form part of the incident. In our view the Gauhati High Court has misconstrued and misinterpreted the principle laid down by the Supreme Court in Ram Kumar's case (supra) and therefore we find it difficult to agree with the proposition of law laid down by the Gauhati High Court that non-mention of dying declaration in F.I.R. is fatal to the prosecution case. Therefore, the respondent is not entitled to acquittal on ground that the fact that dying declaration was recorded by Mr.Tivedi, is not mentioned in the F.I.R. The statements of the deceased, recorded by the Executive Magistrate and Police Jamadar soon after the incident are quite natural and voluntary Evidence of Executive Magistrate, police jamadar and witness Bavanji Kurjibhai relating to dying declaration of the deceased is straight forward, firm and trustworthy. The dying declarations made by the deceased are consistent with each other. No material part of any of the dying declarations is proved to be false by any reliable evidence on record. The deceased had every opportunity to identify the respondent as her assailant.

The version narrated by the deceased is intrinsically sound and accords with probabilities. Having regard to the totality of the facts and circumstances of the case we are of the opinion that the learned Judge did not commit any error in placing reliance on dying declarations of the deceased for the purpose of coming to the conclusion that the respondent has set the deceased on fire by means of a burning wick of rags. The said finding being eminently just is hereby upheld.

12. The contention raised by Shri Raval, learned Counsel for the respondent that the offence against the respondent could only be under Section 326 of the Indian Penal Code or at the best under Part-II of Section 304 of Indian Penal Code has no substance.

13. Whenever a Court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to 'culpable homicide' as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the third stage for considering the operation of Section 300 of Indian Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative, the offence would be 'culpable homicide not amounting to murder' punishable under the first or the second part of Section 304 depending respectively on whether the second or the third clause of Section 299 is applicable. If the Court finds that the case comes within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300, the further inquiry to be made should be to find out whether the case comes within any of the Exceptions enumerated in Section 300 and if this question is found in the positive, the offence would still be 'culpable homicide not amounting to murder' punishable under the First Part of Section 304. On the analysis of the evidence if the Court finds that the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300 and the case does not fall within any of the

Exceptions enumerated in Section 300, the offence would be 'murder' and not 'culpable homicide not amounting to murder'. The cause of death of the deceased as stated by Dr.Tarlikaben Shah was Septicaemia which was due to antemortem burns. Dr.Tarlikaben has stated in her evidence that the deceased had received 60% burns and her general condition was serious. In paragraph 3 of her deposition Dr.Tarlikaben has explained that initially burn injuries were found to be of first and second degree but with the passage of time the burn wounds had become deep and third degree burn injuries were noticed on the deceased. Though the Doctor has stated that the burn injuries sustained by the deceased were likely to cause her death, on examination of the relevant evidence on record, we are satisfied that the burn injuries suffered by the victim resulted in her death and septicaemia which developed later on was also due to infection of burns sustained by her. Septicaemia in simple medical terminology is understood to mean poisoning of blood. After it sets in, it affects first of all the kidneys, then brain and ultimately the heart causing death of the patient. Normally, a patient dies within 48 hours of setting in of Septicaemia. Thus, the burn injuries has caused death of victim and the same were caused by the appellant. We are of the opinion that even if a supervening factor causes death and the supervening factor is necessary consequence or necessary incidence of the injury caused by the accused, then it can be said that the act of the accused itself has caused the death of the victim concerned. It is only when the intervening cause is totally unrelated to the original injury caused by the act of the accused, it can possibly be contended that the death was not the direct or proximate result of the act of the accused. We have before us the evidence of Dr.Tarlikaben who conducted autopsy on the dead body, which shows that septicaemia was the necessary consequence of the burns injury suffered by the victim. We have, therefore, no hesitation in holding that it was the act of the respondent which resulted in the death of the deceased Santokben.

14. The act of setting terylene clothes put on by the deceased on fire, in our opinion, necessarily implies intention on the part of the respondent to cause the death of the deceased. If a person sets on fire terylene clothes of a person from all sides, and if that person dies, the only intention that could be attributed is that of causing death of that person. In B.Venkateshwarlu v. State of Andhra Pradesh A.I.R., 1974 S.C. 2363, it was held that when one of the accused poured kerosene on the boy after which the appellant lighted a match and set

fire to his clothes, the intention was to cause death of that boy and there was no doubt about that intention. On the facts and in the circumstances of the present case we are of the opinion that the intention of the respondent in setting on fire the clothes of the deceased was to cause her death and therefore the offence committed by the respondent would squarely fall within the first clause of Section 300 of Indian Penal Code.

15. Even otherwise, we are of the firm opinion that clause four of Section 300 of Indian Penal Code would also apply to the facts of the present case. The said clause reads as under :-

Section 300 ;

Except in the cases hereinafter excepted, culpable homicide is murder.

"4thly :- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such bodily injury as aforesaid."

On analysis of Section 300 of Indian Penal Code, it becomes noteworthy that the 'intention to cause death' is not an essential requirement of clause (4) of Section 300. Only the knowledge on the part of the accused that commission of act by him is so imminently dangerous that it must in probability, cause death or such bodily injury as is likely to cause death, is sufficient to bring the killing within the ambit of this clause. Clause (c) of Section 299 and clause (4) of Section 300, both require knowledge of the probability of the act causing death. In our view clause (4) of Section 300 of Indian Penal Code would be applicable where the knowledge of the offender as to the probability of death of a person being caused from his immeniently dangerous act, approximates to a practical certainty. For application of clause (4) of Section 300, it is not necessary for the prosecution to prove that the death is caused either with the intention of causing death or with the intention of causing such bodily injury, as was likely to cause death and only the knowledge is to be fastened on the offender that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injury as was likely to cause death.

16. At this stage, it would be instructive to refer to three Judge Bench decision of the Supreme Court in State of Madhya Pradesh v. Ram Prasad, A.I.R. 1968 S.C.881. In that case Ram Prasad who was living with his mistress Rajji had quarrels with her. On the date of the incident, the respondent had put kerosene oil on her and set her alight. Rajji was extensively burnt. At the conclusion of the trial, the Sessions Court convicted the respondent under Section 324 of the Indian Penal Code, but in appeal by the State, the High Court convicted the respondent of the offence a little higher namely culpable homicide not amounting to murder. While reversing the decision of the High Court, the Supreme Court held that the respondent must have known that he was running a risk of causing death of Rajji or such bodily injury as was likely to cause her death and as he had no excuse for incurring that risk, the offence must be taken to fall within 4thly of Section 300 of Indian Penal Code. The pertinent observation made in paragraph 8 of the reported judgment by the Supreme court are as under :-

> "The question then arises, what was the offence which Ram Prasad can be said to have been committed? The offence of causing injury by burning is a broad spectrum which runs from Section 324 causing simple injury by burning through Section 326, namely, causing grievous injury by burning to the two major offences, namely, culpable homicide not amounting to murder and even murder itself. The Session Judge chose the lowest end of the spectrum which is surprising enough, because the burns were so extensive that they were certainly grievous by all account. The High Court placed the offence a little higher, namely, culpable homicide not amounting to murder. We think that the matter goes a little further than this. As death has been caused the question has to be considered in the light of homicide to determine whether the action of Ram Prasad falls within culpable homicide not amounting to murder or the higher offence of murder itself. Here we see that death has actually been caused by the Criminal act; in other words, there has been homicide and since it is not accidental or suicidal death responsibility for the homicide, in the absence of any exceptions or extenuating circumstances, must be borne by the person who caused it. The High Court has apparently stopped short by

holding that this was a case of culpable homicide not amounting to murder. The question is whether the offence falls in any of the clauses of Section 300 of Indian Penal Code. In this connection it is difficult to say that Ram Prasad intended causing the death of Mst.Rajji although it might well be the truth. That he set fire to her clothes after pouring kerosene oil is a patent fact and therefore the matter has to be viewed not only with regard to the firstly of Section 300, but all the other clauses also. We do not wish to consider the second and the third clauses, because the question then would arise what was the extent of the injury which Ram Prasad intended to cause or knew would be caused to Mst.Rajji. That would be a matter of speculation. In our opinion, this matter can be disposed of with reference to clause fourthly of Section 300. That clause reads as follows :-

"....culpable homicide is murder.....

if the person committing the act knows that it is so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk or causing death or such injury as aforesaid."

It is obvious that there was no excuse for Ram Prasad to have taken the risk of causing the death or such bodily injury as was likely to cause death. The question therefore arises whether Ram Prasad knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, so as to bring the matter within the clause. Although clause fourthly is usually invoked in those cases where there is no intention to cause the death of any particular person (as the illustration shows) the clause may on its terms be used in those cases where there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death. In the present case, Ram Prasad poured kerosene upon the clothes of Mst.Rajji and set fire to those clothes. It is obvious that such fire spreads rapidly and burns

> extensively, No special knowledge is needed to know that one may cause death by burning if he sets fire to the clothes of a person. Therefore, it is obvious that Ram Prasad must have known that he was running the risk of causing the death of Rajji or such bodily injury as was likely to cause her death. As he had no excuse for incurring that risk, the offence must be taken to fall within 4thly of Section 300, Indian Penal Code, in other words, his offence was culpable homicide amounting to murder even if he did not intend causing the death of Mst.Rajji. He committed an act so imminently dangerous that it was in all probability likely to cause death or to result in an injury that was likely to cause death. We are accordingly of the opinion that the High Court and the Sessions Judge were both wrong in holding that the offence did not fall within murder".

17. Applying the principle laid down by the Supreme court in the above quoted decision to the facts of the present case, we find that there was no excuse for the respondent to have taken the risk of causing death of the deceased or such bodily injury as was likely to cause death. The question arises whether the respondent knew that her act was so imminently dangerous that it must in all probability would cause death of the deceased or such bodily injury as was likely to cause her death so as to bring the matter within clause 4 of Section 300 of Indian Penal Code. Although clause 4thly is usually invoked in those cases where there is no intention to cause the death of any particular person, as the illustration shows, the clause may on its terms be used in those cases where there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death. In the present case, the respondent set on fire the terylene clothes put on by the deceased from all sides. No special knowledge is needed to know that one may cause death by burning if he sets fire to the terylene clothes of a person. The respondent knew very well that the deceased was not able to offer any resistance because she was carrying a pot full of water on her head and a little girl in waist. The evidence does not indicate that the respondent tried to give any aid to the victim after she suffered burn injury. The manner in which the incident had taken place would indicate that the respondent had done the act of setting the terylene clothes of the

deceased with intention to cause her death or atleast she knew that her act was so imminently dangerous that it must in all probability would cause death or such bodily injury as was likely to cause death of the deceased. In our view, therefore, the case is also covered under 4thly clause of Section 300 and the learned Judge was not justified in convicting the respondent under Part-II of Section 304 of the Indian Penal Code. In Jairaj (supra) the accused had stabbed the deceased with a small knife in a sudden occurrence. The deceased had died more than nine days after the receipt of the injury. During the period he had been operated upon in the hospital. The injury was not caused either with the intention of causing death or with the intention of causing such bodily injury as was sufficient to cause death in the ordinary course of nature. The doctor conducting the autopsy had stated that the injury was likely to cause death. According to the Supreme Court, act of accused was falling under Section 299 (b) of Indian Penal Code. Under the circumstances it was held that the offence fell under First Part of Section 304 and not under Section 302 of Indian Penal Code. In our view the facts of the said case are quite different from the facts found in the present case and therefore the principle laid down in the said decision could not have been made applicable to the facts of the present case. The learned Judge has misconstrued provisions of Section 300 and Part-II of Section 304 necessitating our interference in the present appeal. The result of the above discussion is that the appeal filed by the State will have to be allowed and the respondent will have to be convicted under Section 302 of the Indian Penal Code.

18. For the foregoing reasons the appeal filed by the State succeeds. The respondent is convicted under Section 302 of the Indian Penal Code for murder of her daughter-in-law Santokben and is sentenced to life imprisonment. It hardly needs to be emphasized that the sentence which she has undergone pursuant to her conviction under Part-II of Section 304 of the Indian Penal Code would be set off as required by Section 428 of the Code of Criminal Procedure. Having regard to the facts of the case, the respondent is directed to surrender to custody on or before June 10, 2001 failing which she shall be taken into custody by the authorities and lodged in jail for undergoing rest of the sentence. We notice that the learned Judge while imposing sentence under Part-II of Section 304 of Indian Penal Code has directed the respondent to pay fine of Rs.3,000/- or in default R.I. for one year. It is also directed that out of fine paid, Rs.750/- should be given to each of three

daughters of the deceased as compensation. The record of the case does not indicate that fine is paid by the respondent. Section 302 of the Indian Penal Code does not make it imperative to impose a sentence of fine where an accused is convicted under Section 302 of the Indian Penal Code, and is sentenced to imprisonment for life. The Code confers a discretion on the Court to sentence an accused as it thinks proper. When a Court imposes a sentence of fine also under Section 302 of Indian Penal Code, then obviously the Court has got to give reasons why a sentence of fine over and above the substantive sentence of fine also was being imposed, for the simple reason that a sentence of fine over and above the substantive sentence is deemed to be in excess thereof, and it has always been thought desirable to give reasons for imposing the excess penalty. This is the view taken by the Division Bench of this Court in A.C.Govind v. State, 1982 (1) G.L.R. 54. We do not find any good reason for imposing the excess penalty. The sentence of fine in our view is not called for at all and as the fine is not paid, the same is hereby set-aside.

(J.M.Panchal, J).

(S.D. Dave, J).

/phalguni/